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No. 09-820

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation, and
THE LUMMI NATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO STATEMENT

This case involves a homeowner's shore defense structure, protecting her property from storm surges in Washington State. The court ordered her to remove the structure as a violation of the Rivers and Harbors Act (RHA) even though no RHA permit was required when the structure was built. Her structure was also held to constitute a trespass even though it was built on her own land and the beach which separated her structure from the property boundary, the Mean High Water Line (MHWL), has eroded away so that MHWL now at times extends to her structure.

The United States begins its brief with a statement recounting its version of the facts. Brief for the United States in Opposition (US Brief) at 1. A couple of points need clarification.

In its first sentence, it introduces a concept which is repeated through its brief that Mrs. Sharp "maintains" a shore defense structure. Importantly, her liability is not for maintenance *activities* because in this case "maintain" simply means to allow to exist.

Mrs. Sharp contends that the tidelands are not owned by the United States, but were transferred to the State of Washington at statehood. In discussing the Executive Order which expanded the reservation, the Government asserts that the inclusion of tidelands "reflect[ed] the Lummi's historic use of tidelands for fishing and harvesting shellfish." US Brief at 2 (citing Pet. App. 18). However, the Lummi already had treaty rights to fish and shellfish from

tidelands regardless of whether they were within a reservation. *See United States v. Washington*, 520 F.2d 676 (9th Cir. 1975). Historic fishing or shellfishing by a tribe is no reason to expect that tidelands were reserved. *See United States v. Aam*, 887 F.2d 190 (9th Cir. 1989); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963). Instead, inclusion of tidelands would prohibit non-tribal members from setting up camps immediately outside of the reserved uplands until tribal members could obtain title to their allotments.

Finally, the United States describes the district court's injunction as if it were a small thing, merely "directing the structures' removal." US Brief at 7 (citing Pet. App. 36). Instead, it is a mandatory *perpetual* injunction that requires Mrs. Sharp to remove portions of her structure in perpetuity as the MHWL continues to move landward. Pet. App. 62-63.

REPLY TO ARGUMENT

1. Trespass

The Government argues that this case is not suitable for resolving a fundamental property issue for several reasons.

First, the Government notes that the State of Washington is not a party. This poses no bar to Mrs. Sharp's defense of the trespass action. *See* Pet. App. 12 n.7. That holding was based not only on clear

precedent, *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255-56 (9th Cir. 1983), but also on the general law of trespass in circumstances where the plaintiff is not in possession. Pet. App. 12 n.7.

In response, the Government argues that tidelands cannot be "possessed" in the same manner as other property. US Brief 9. It argues that the Government has not parted with legal title to the tidelands and that the legal status has been "held in trust." *Id.* But assertions about legal title or status are not the same as possession. The latter is a concept based on physical and observable realities as to presence on the property at issue.

The government next claims that the Lummi Nation has used the tidelands generally for fishing and shellfishing. *Id.* (citing Pet. App. 18). Of course, the court of appeals was referring to tidelands generally and historically. It was not addressing use of the tidelands at the time the suit was brought. Use of tidelands generally does not mean the Lummi Nation was using the tidelands at the location of Mrs. Sharp's bulkhead or riprap.

Because the rulings in this case are based on the premise that the shore defense structure was built on uplands at the time of construction, it is impossible for the United States or the Lummi Nation to have possessed the site of this shore defense structure at the time of its construction.

Finally on this point, the Government asserts that it instituted quiet title actions (decades ago) and

authorized a lease in 1963 and that such is sufficient to equate to possession. Mere assertions of legal title is insufficient to constitute possession. As the court of appeals agreed, petitioner is not precluded from arguing that the state owns the tidelands on which her shore defense structure rests.

The Government also asserts that preclusion prevents this Court from deciding whether the tidelands bordering Mrs. Sharp's home belong to the United States simply because a court found that tidelands in front of someone else's property belonged to the United States. US Brief 9 (citing *United States v. Stotts*, 49 F.2d 619 (W.D. Wash. 1930)). The court of appeals soundly rejected this defense. Pet. App. 12-13 n.7.

2. Equal Footing Doctrine

Petitioner argues that the tidelands in front of her property were transferred to the State at statehood under the equal footing doctrine because Congress took no action to reserve these tidelands from the state.

The Government raises several responses. First, it argues that prior cases generally on ownership of tidelands at Sandy Point have become a rule of property. Certain precedents that become rules of property because titles could be jeopardized if they are not followed. For example, an upland owner cannot place artificial fill on submerged lands to gain uplands, but an upland owner can hold back the sea from the

uplands. *United States v. California*, 381 U.S. 139, 176-77 (1965). The Government is not arguing that some precedent on property law generally is a rule of property.

Instead, the Government appears to be relying on the other category of rules of property where title to specific land has been adjudicated. Such adjudications generally should not be reversed when the settling of title has long been relied upon by others. The court of appeals recognized that earlier cases never adjudicated title to tidelands fronting Mrs. Sharp's property. Nevertheless, the Government argues that parties in the area have ordered their affairs on the assumption that the Lummi Nation owns the tidelands. US Brief 11 (citing lease from 1963 to 1988). However, this vastly overstates reality, given that petitioner was never a party to that lease, that no lease has existed for 22 years, and nothing else suggests that ownership of the tidelands in front of her property is considered settled.

Second, as to the merits of the equal footing doctrine issue, the second of the two factors is at issue: Congressional recognition of the "reservation in a way that demonstrates an intent to defeat state title." US Brief 11 (citing *Idaho v. United States*, 533 U.S. 262, 273 (2001)).

The Government argues that admitting Washington to a state required a disclaimer of title to land owned or held by Indians. US Brief 12. Its theory is that this standard boilerplate disclaimer was

sufficient to overcome the normal presumption. To support this theory, it relies on *Alaska v. United States* (*Glacier Bay*), 545 U.S. 75, 100-11 (2005) and *United States v. Alaska* (*Arctic Coast*), 521 U.S. 1, 50-61 (1997). US Brief 12. In contrast, the two executive reservations in *Alaska* (*Arctic Coast*) were specifically identified either by name in the case of the petroleum reserve (*id.* at 41) or by reference to a specific purpose in the case of wildlife. *Id.* at 56-57; *Glacier Bay*, 545 U.S. at 104-05.

The Government's assertion that the court of appeals' analysis complies with *Idaho,* 533 U.S. 262 is similarly inaccurate. Under the requirement that Congress be "on notice" of the executive's reservation, the Government merely cites the court of appeals' *assumption* that Congress was put on notice. US Brief 13 (citing Pet. App. 17). If Congressional notice may now be assumed from the mere existence of the executive order, then the notice requirement is relegated to a meaningless prong of the test.

Additionally, the notion that the purpose of the reservation would be compromised if the state received title to the tidelands is unsupported by history or precedent. As indicated *supra* at 1-2, the Lummi Nation has treaty-protected rights to fish and shellfish regardless of ownership of the tidelands.

The Government argues that under the common law waterfront boundaries are "ambulatory." US Brief 14. This argument simply begs the question as to whether the property boundaries are where the water

actually flows or, as held by the court of appeals, where the water would flow if the shore were left in its natural state.

The Government also overstates the symmetry associated with its version of the rule. US Brief 15. In times of accretion, the upland property owner gains ground. But, contrary to the Government's contention, the tideland owner loses nothing – the tidelands continue to adjoin the uplands and simply move seaward as the uplands move seaward. Yet when erosion occurs, the upland owner does lose ground and the tidelands move landward, unless the erosion can be abated.[1]

In regard to the choice of law question, the Government asserts that Mrs. Sharp has identified "no basis for concluding that a uniform national rule is needed." US Brief at 16. However, this Court's decision in *Hughes v. Washington*, 389 U.S. 290 (1967) is clear that state law cannot divest owners of ocean-fronting property of rights under the federal common law.

In response to the amicus curiae brief of Pacific Legal Foundation, the Government asserts that the court of appeals ruling does not apply to reclaimed

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[1] The Government quotes the district court's notation that the defendants in this case ignored the "largely undisputed evidence that shore defense structures cause environmental damage to the tidelands." Pet. App. 61, *cited in* US Brief at 15. Environmental damage was never an issue in this case.

lands, as are common among coastal cities. US Brief 17 (citing Pet. App. 62). Setting aside the fact that the line moves and Petitioner's structure is intersected by the MHWL periodically, the fallacy in the respondent's argument is this: when the MHWL intersects the structure, the actual MHWL does not lie on the shoreline at all – it lies on her structure, as is the case with any dike, embankment or revetment. The court of appeals' rule of property law is that the tideland owner owns the property underneath a structure if the MHWL falls on the face of the structure. The far-reaching consequence of this decision cannot be over-estimated.

To give the impression that this case has little importance, the United States argues that estoppel or adverse possession might be a defense to a trespass action filed by the owners of tidelands abutting a dike in New Orleans, San Francisco or Boston. However, governmental entities are not subject to estoppel or adverse possession, *see, e.g., United States v. Hato Rey Bldg. Co., Inc.*, 886 F.2d 448 (1st Cir. 1989). Additionally, as the MHWL moves, structures holding back the MHWL may not extend in the same place for the entirety of a prescriptive period. The court of appeals' decision that upland owners cannot hold back the water line and prevent erosion has extensive impacts to all coastal property owners.

3. Rivers and Harbors Act (RHA)

As addressed in the petition at 20-21, Section 10 of the RHA contains three prohibitions contained in three clauses. The court of appeals rearranged the text and ruled that the mere existence of the MHWL intersection with petitioner's structure renders it a violation of the RHA even though it needed no permit at the time of construction.

The Government begins with the assertion that there is no "meaningful practical impact" on this case because the injunction could have been imposed under the trespass theory. US Brief 18. However, the argument entirely misses the point because the court ruled there can be no balancing of competing interests as would occur under the trespass cause of action. Pet. App. 36. As stated in the petition, petitioner disagrees with that interpretation of the RHA and that an injunction should not automatically issue under the RHA to remove a structure protecting a home from devastation simply because the structure prevents the Strait of Georgia from expanding slightly with no impact on the navigable capacity.

Nevertheless, the RHA issues are critical precisely because an injunction to be issued under trespass would require the balancing of competing interests, which was not done because the RHA was the purported basis of the injunction. *See Restatement (Second) of Torts* § 941 (1979).

The United States also asserts that review is unwarranted because changes to the text of the codified

version of the RHA now contains 33 U.S.C. Section 403a. US Brief 19. At most, this creates a question as to whether the word "continuance" of an obstruction to the navigable capacity of the nation's waters is a violation of 33 U.S.C. Section 403a. This newly revived section has no effect on whether the first clause of Section 10 requires an obstruction to navigable capacity for a violation to occur.

Both the court of appeals and the Government equate obstructions to navigable capacity and structures built in navigable waters. "[S]tructures listed in the second clause of Section 10 are 'presumed to constitute obstructions' for purposes of the first clause." US Brief 23 (quoting *Sierra Club v. Andrus*, 610 F.2d 581, 596 (9th Cir. 1979), *rev'd on other grounds sub nom. California Sierra Club*, 451 U.S. 287 (1981)).[2] The error in the *Sierra Club* decision's statutory construction is manifest: if a structure in navigable waters is equated with an obstruction to navigable capacity in the second clause, none can be permitted by the Corps because only Congress can approve an obstruction to the navigable capacity of a waterway.

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[2] The Government also cites *Norfolk & W. Co. v. United States*, 641 F.2d 1201, 1210 (6th Cir. 1980) to support this conclusion in *Sierra Club*. However, the court in *Norfolk* merely repeats the rule that obstructions to navigable capacity do not require a showing that ships could not enter the waterway when a dock collapsed. This rule arising out of collapsed commercial dock is a far cry from a homeowner's bulkhead in a residential area.

The Government attempts to prop up its equating of obstructions under clause one with unpermitted structures in clause two with two arguments. First, it argues that petitioner's interpretation would render the Corps powerless over structures in navigable waters "without regard to their impact on navigation or other relevant factors" in cases where the Corps does not know whether the structures were in navigable waters when built. US Brief 22. This is untrue.

The question as to whether something is an obstruction to navigable capacity is a question of fact. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 729 (1899). The Corps retains the same authority to protect navigable waters from obstructions; it lacks the authority to mandate removal of structure that has no impact on navigable capacity and was built on land when no permit was required.

Second, the Government argues that the Court in *United States v. Republic Steel Corp*, 362 U.S. 482 (1960) held that clause one obstructions do not need Congressional approval, but may be approved by the Corps. US Brief 24 n.9 (citing 362 U.S. 483 and *Sanitary Dist. v. United States*, 266 U.S. 405, 423, 429 (1925)). The cited portion of *Republic Steel* is a description of the Government's suit as one seeking an injunction for failing to get a permit. The Court did not rule that obstructions to navigable capacity do not need Congressional approval. Similarly, the discussion in *Sanitary District* about obstructions to navigable capacity was not essential to the holding

because the lowering of the water in that case would "alter and modify" the condition of the river. Alteration and modification of a waterway are actions which can be permitted under the third clause of Section 10 of the RHA.

In regard to the conflict among the various circuits regarding strict liability, the Government essentially responds that petitioner built her shore defense structure intentionally. US Brief 25-26. While it might be foreseeable that the water line might move, it is not foreseeable that such circumstances automatically makes the structure an obstruction to navigable capacity.

The Government characterizes the District Court's statement that "after-the-fact permits" are generally unavailable as dicta and incorrect. US Brief 27 n.12 (citing Pet. App. 59). The statement is clearly not dicta because petitioner urged the court that any RHA violation should be remedied by an order that she file for an after-the-fact permit. The court of appeals noted that the Government's regulatory concerns could be alleviated by an agreement with the Lummi Nation. App. 44. Given the lack of navigational concerns, removal is too extreme a remedy. Not allowing an after-the-fact permit for a harmless shore defense structure appears to be more about strong arming petitioner to sign an agreement with the Lummi Nation, than about any legitimate navigational concerns.

Finally, there is clearly a conflict with this Court's jurisprudence in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) on whether courts should balance interests under a regulatory scheme such as the RHA. Whereas the national interest in protecting the nation's waterways may often weigh heavy in the balance, that does not mean there are no situations where the impact on navigation is so speculative and the impact to the private property owner is so devastating that the balance tips against the injunction remedy. Mrs. Sharp's situation is such a case.

CONCLUSION

The petition should be granted and the decision of the Ninth Circuit should be reversed.

DATED: May, 2010.

Respectfully submitted,

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